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Number of Pages Including this Page: 16

- 1) Fee Transmittal (1 page)
- 2) Appeal Brief (14 pages)
- 3)
- 4)
- 5)

Inventor(s): Fred N. Desai et al.

S.N.: 09/909,486

Filed: July 20, 2001

Case: 8642

Comments:

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U.S. Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

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FEE TRANSMITTAL for FY 2005 Patent fees are subject to annual revision.	Complete If Known	
	Application Number	09/906,486
	Confirmation Number	2573
	Filing Date	July 20, 2001
	First Named Inventor	F. N. Desai et al.
	Examiner Name	A. A. Chevalier
	Art Unit	1772
TOTAL AMOUNT OF PAYMENT (\$) 340.00		Attorney Docket No. 8642

METHOD OF PAYMENT		FEE CALCULATION (continued)																																																																																																																									
1. <input checked="" type="checkbox"/> The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to: Deposit Account Number: 16-2480 Deposit Account Name: The Procter & Gamble Company		3. ADDITIONAL FEES <table border="1"> <thead> <tr> <th>Code</th> <th>(S)</th> <th>Fee Description</th> <th>Fee Paid</th> </tr> </thead> <tbody> <tr><td>1051</td><td>130</td><td>Surcharge-late filing fee or oath</td><td><input type="checkbox"/></td></tr> <tr><td>1052</td><td>50</td><td>Surcharge-late provisional filing fee or cover sheet</td><td><input type="checkbox"/></td></tr> <tr><td>1033</td><td>130</td><td>Non-English specification</td><td><input type="checkbox"/></td></tr> <tr><td>1812</td><td>2,520</td><td>For filing a request for <i>ex parte</i> reexamination</td><td><input type="checkbox"/></td></tr> <tr><td>1804</td><td>920*</td><td>Requesting publication of SIR prior to Examiner's action</td><td><input type="checkbox"/></td></tr> <tr><td>1805</td><td>1,840*</td><td>Requesting publication of SIR after Examiner's action</td><td><input type="checkbox"/></td></tr> <tr><td>1251</td><td>110</td><td>Extension for reply within 1st month</td><td><input type="checkbox"/></td></tr> <tr><td>1252</td><td>430</td><td>Extension for reply within 2nd month</td><td><input type="checkbox"/></td></tr> <tr><td>1253</td><td>980</td><td>Extension for reply within 3rd month</td><td><input type="checkbox"/></td></tr> <tr><td>1254</td><td>1,530</td><td>Extension for reply within 4th month</td><td><input type="checkbox"/></td></tr> <tr><td>1255</td><td>2,080</td><td>Extension for reply within 5th month</td><td><input type="checkbox"/></td></tr> <tr><td>1401</td><td>340</td><td>Notice of Appeal</td><td><input type="checkbox"/></td></tr> <tr><td>1402</td><td>340</td><td>Filing a brief in support of an appeal</td><td><input checked="" type="checkbox"/></td></tr> <tr><td>1403</td><td>300</td><td>Request for oral hearing</td><td><input type="checkbox"/></td></tr> <tr><td>1451</td><td>1,510</td><td>Petition to institute a public use proceeding</td><td><input type="checkbox"/></td></tr> <tr><td>1452</td><td>110</td><td>Petition to revive - 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SUBMITTED BY		Complete (if applicable)	
Name (Print/Type)	Eric T. Addington	Registration No. (Attorney/Agent)	52,403
Signature		Telephone	(513) 626-1602
		Date	October 27, 2004

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OCT 27 2004

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 09/909,486
 Applicant(s) : F.N. Desai, et al.
 Filed : July 20, 2001
 Title : High-Elongation Apertured Nonwoven Web and
 Method for Making
 TC/A.U. : 1772
 Examiner : A.A. Chevalier
 Conf. No. : 2573
 Docket No. : 8642
 Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office decision of Paper No. 05242004 dated May 27, 2004. A timely Notice of Appeal was filed on August 27, 2004.

REAL PARTY IN INTEREST

The real party of interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1 to 10 are rejected. Claims 11-20 have been withdrawn from consideration.
 Claims 1 to 10 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

An after final amendment was filed on July 26, 2004. In the amendment, Claims 1 and 7 were amended as follows:

1. A nonwoven web comprising a plurality of apertures each having a hole size greater than 2 mm², and a hole aspect ratio less than 6, said nonwoven web having an open area greater than 15% and ~~being capable of exhibiting~~ at least 70% extension in the cross machine direction at a loading of 10 g/cm.

7. A nonwoven web comprising a plurality of apertures formed by application of a tensioning force, said apertures coincident with a plurality of weakened, melt-stabilized locations, said apertures having a circumferential edge, a portion of said circumferential edge being defined by a remnant of said melt-stabilized locations, said nonwoven web ~~capable of exhibiting~~ extension in the cross machine direction of at least 70% at a loading of 10 g/cm.

In the Advisory Action (Paper No. 08022004) dated August 4, 2004, the Office refused entry of the amendment. In support of the refusal, the Office stated that the amendment presented "new issues requiring a novel search and/or further consideration." Appellant asserts that a novel search is not required since a nonwoven web exhibiting the claimed extension will necessarily be capable of the claimed extension. Any search previously conducted by the Office for nonwoven webs capable of the claimed extension will necessarily include all nonwoven webs that exhibit the claimed extension. The amendment requires no additional search and no more than a cursory review by the Office. However, Appellant shall proceed with the Appeal given the unamended claims as set forth in the Claims Appendix attached herein

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 relates to a nonwoven web having a plurality of apertures each having a hole size greater than 2 mm² (page 7, lines 15-16). The apertures have a hole aspect ratio (i.e., the ratio of the major axis to the minor axis of an ellipse) less than 6 (page 7, line 21). The nonwoven web has an open area greater than 15% (page 7, line 15) and is capable of exhibiting at least 70% extension in the cross machine direction at a loading of 70 g/cm (page 7, lines 23-25).

Claim 7 relates to a nonwoven web comprising a plurality of apertures formed by application of a tensioning force (page 12, lines 9-14). The apertures are coincident with a plurality of weakened, melt-stabilized locations (page 12, line 14). The apertures have a circumferential edge with the circumferential edge being defined by a remnant (Fig. 7, Item 205) of said melt-stabilized locations (page 12, lines 32-33). The nonwoven web is capable of extension in the cross machine direction of at least 70% at a loading of 10 g/cm (page 7, lines 23-25).

GROUND'S OF REJECTION TO BE REVIEWED ON APPEAL

I. Claims 1, 4, and 6 stand rejected under 35 USC § 103(a) as being unpatentable over U.S. Patent No. 5,873,868 to Nakahata et al. (hereafter "Nakahata") in view of U.S. Patent No. 6,452,063 to Curro et al. (hereafter "Curro").

II. Claims 7-10 stand rejected under 35 USC § 103(a) as being unpatentable over Nakahata in view of U.S. Patent No. 4,588,630 to Shimalla (hereafter "Shimalla").

III. Claims 1-4 and 6 stand rejected under 35 USC § 103(a) as being unpatentable over Nakahata in view of Shimalla in further view of Curro.

IV. Claim 5 stands rejected under 35 USC § 103(a) as being unpatentable over Nakahata in view of Curro in further view of U.S. Patent No. 5,628,097 to Benson et al (hereafter "Benson").

ARGUMENTS

I. Claims 1, 4, and 6 are not properly rejected under 35 U.S.C. § 103(a) as being unpatentable Nakahata in view of Curro.

The Office's reasoning for this rejection is provided in Paper 13, Paragraph 7. In support of this rejection, the Office states that Nakahata discloses a disposable absorbent article. The Office states that Nakahata discloses a nonwoven web comprising a plurality of apertures each having a hole size greater than 2 mm². The Office asserts that "[f]igure 4 in Nakahata appears to teach the web having an open area greater than 15%." The Office states that "Nakahata further discloses that the topsheet has an elastic extensibility of from about 10% to about 500% in the cross machine direction." The Office concedes that Nakahata fails to disclose a hole aspect ratio of less than 6. The Office states that Curro teaches an apertured topsheet with an aspect ratio between 1.5:1 and 5:1. The Office states that Nakahata and Curro are analogous because they both disclose disposable absorbent articles. The Office concludes that "[i]t would have been obvious to one of ordinary skill in the art at the time of the invention to use an aspect ratio of less than 6 in Nakahata as taught by Curro in order to provide the benefit of retaining more open area when the web is extended."

A. The Office has failed in its prima facie case of obviousness by not teaching or suggesting the Claim 1 limitation of "said nonwoven web having an open area greater than 15%." In view of Nakahata's Fig. 4, the Office states that Nakahata "appears to teach" Appellant's claim limitation of a nonwoven web having an open area greater than 15%. Nakahata provides no disclosure of open area within the specification. The Office does not rely on Curro to teach or suggest the present claim limitation. Case law states, "[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular

sizes if the specification is completely silent on the issue.” *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, 55 U.S.P.Q.2D 1487 (Fed. Cir. 2000). The Office is relying on the drawings of Nakahata to show the proportions and sizes of elements (i.e., open area of greater than 15%) while the specification of Nakahata is silent as to the open area. In light of the holding of the Federal Circuit, the Office may not read a precise proportion from the drawings.

The Office, in Paper 05242004, states that “the drawing and pictures can anticipate claims if they clearly show the structure which is claimed.” Appellant does not dispute the validity of the Office’s assertion; however, the assertion is not applicable to Appellant’s argument. The Office is not merely relying on Nakahata to teach the structure (i.e., openings in a topsheet), but rather the Office is using Nakahata to teach the proportion of the structure (i.e., open area of greater than 15%). The Office states, “Nakahata clearly shows that the web has an open area greater than 15%.” Paper 05242004, Para. 6. The Office’s assertion is contrary to *Hockerson-Halberstadt* which states that “patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” The Office has not demonstrated that the Nakahata specification teaches or suggests the open area percentage. As a result, the Office may not rely on the Figure 4 to teach or suggest a precise proportion. Since Nakahata fails to teach or suggest Appellant’s limitation of an open area greater than 15%, the Office has failed in its *prima facie* case of obviousness to teach or suggest each and every claim limitation.

B. The Office has failed in its prima facie case of obviousness by not teaching or suggesting the Claim 1 limitation of “said nonwoven web . . . being capable of at least 70% extension in the cross machine direction at a loading of 10 g/cm”. The Office states, “Nakahata further discloses that the topsheet has an elastic extensibility of from about 10% to about 500% in the cross machine direction, which reads on Appellants’ limitation being capable of at least 70% extension in the cross machine direction at a loading or (sic) 10 g/cm.” However, Nakahata fails teach or suggest a nonwoven web that is capable of at least 70% extension *at a loading of 10 g/cm*. Throughout prosecution, the limitation of “at a loading of 10 g/cm” has continued to be read out of Claim 1 by the Office.

The Office, in Paper 05242004, states that “since Nakahata discloses that the topsheet has an elastic extensibility of from about 10% to about 500% in the cross machine direction by a tensile force . . . , it is deemed to have the ‘ability to’ have at least 70% extension in the cross machine direction at a loading or (sic) 10 g/cm.” Again, the relevant teaching or suggestion that is missing from Nakahata is the load required to produce the recited extensibility. The Office provides no reasoning as to why the topsheet of Nakahata is “deemed” to have 70% extension in

the cross machine direction at a loading of 10 g/cm. The Office fails to point to a teaching or suggestion in Nakahata, Curro, or in any other document that recites the claimed extension at the claimed loading. The Office has failed in its *prima facie* case of obviousness to teach or suggest each and every claim limitation.

Furthermore, in Paper 05242004, the Office states, "Applicant has not provided any evidence that Nakahata is not capable of at least 70% extension in the cross machine direction at a loading of 10 g/cm." The Office's assertion that the Appellant should provide evidence that Nakahata is not capable of claimed extension at the claimed loading is improper. In establishing a *prima facie* case of obviousness, case law clearly places the "burden of proof on the Patent Office which requires it to produce the factual basis for its rejection of an application under sections 102 and 103." *In re Warner*, 379 F.2d 1011, 1016, 154 U.S.P.Q. 173 (CCPA 1967). The Office has not provided a factual basis for its rejection. With out a factual basis for the rejection, the *prima facie* case has not been met, and, as a result, Appellant is under no obligation to submit evidence of nonobviousness.

C. The Office has failed in its *prima facie* case of obviousness by engaging in impermissible hindsight reconstruction in regard to Claim 1. It is well settled that the Office cannot pick and choose among individual elements of assorted prior art references to recreate the claimed invention based on the hindsight of Appellants' application. *See In re Fritch*, 972 F.2d 1260 (Fed. Cir. 1992). Nakahata discloses a topsheet, which may be a nonwoven, with a plurality of discontinuities. Col. 5, line 45. Curro discloses an apertured elastomeric web preferably comprising a formed film having at least two polymeric layers, an elastomer layer and a skin layer. Col. 3, lines 45-49. Curro teaches that the primary apertures have an aspect ratio of greater than about 1.5:1 or any ratio greater than 1:1. Col. 11, lines 3-13. Curro discloses the use of a nonwoven; however, the nonwoven is used as a cover over the elastomeric web so as to provide a soft composite laminate. Col. 15, lines 4-52. Curro does not teach or suggest that the nonwoven is apertured. Appellants submit that the Office has merely selected "aspect ratio" from Curro for insertion into Nakahata without appreciating the distinctions between the two references. One of ordinary skill in the art would not merely select "aspect ratio" from a disclosure on a porous, macroscopically-expanded, three-dimensional, elastomeric web and insert the "aspect ratio" into a disclosure of absorbent article including a liquid pervious topsheet that includes a plurality of slits or cuts that enlarge to define a plurality of openings in the topsheet when the article is subjected to tensile forces while worn. The Office's hypothetical combination is a product of such prohibited "picking and choosing." As a result, the Office has failed in its *prima facie* case of obviousness.

D. The Office has failed in its prima facie case of obviousness in regard to Claim 1 since the proposed modification renders the reference unsatisfactory for its intended purpose. Case law states that if a proposed modification would render the prior art invention unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. See *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984). Nakahata discloses slits (206) that permit openings (212) to form when tensile forces are applied during wear and to close when the tensile forces are removed. See Col. 11, lines 30-64. The openings permit fecal matter to pass through the topsheet. Col. 11, line 45-49. Upon closure of the openings, the fecal matter is concealed from view. Col. 11, lines 58-64. Conversely, Curro discloses a porous, macroscopically expanded, three-dimension, apertured elastomeric web. Curro discloses that the apertures are present when the web is strained or relaxed. Col. 12, lines 15-37 and Figs. 8A-8C. Combining Nakahata and Curro may yield two hypothetical apertured web. Regardless of which hypothetical web is chosen, the hypothetical web renders the prior art invention unsatisfactory for its intended purpose.

- If the hypothetical apertured web has apertures present whether the web is strained or relaxed as taught by Curro, the benefit of the article disclosed in Nakahata is destroyed since the slits will no longer be open and closeable.
- If the hypothetical apertured web has apertures present only upon application of force as taught by Nakahata, the benefit of the article disclosed in Curro is destroyed since the apertures will not remain open while the web is relaxed.

The Office may not combine the references since any resultant combination destroys the intended purpose of the article described in either Nakahata or Curro. As a result, the Office has failed in its *prima facie* case of obviousness.

II. Claims 7-10 are not properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Nakahata in view of Shimalla.

The Office's reasoning for this rejection is provided in Paper 13, Paragraph 8. In support of this rejection, the Office substantially repeats its discussion as to the teachings of Nakahata which are presented above. The Office concedes that "Nakahata fails to disclose that the apertures coincident with a plurality of weakened, melt-stabilized locations and a portion of the circumferential edge of the aperture is defined by a remnant of the melt-stabilized location." The Office states that Shimalla teaches "a nonwoven web comprising a plurality of apertures with circumferential edge, a portion of the circumferential edge being defined by a melt stabilized location." The Office states that the nonwoven web of Shimalla has "a basis weight of about 0.8 to about 4 ounces per square yard . . . which reads on Applicant's claimed range." The Office

concludes that "[i]t would have been obvious to one of ordinary skill in the art at the time of the invention to use the material and melt-stabilized holes of Shimalla as the materials and holes of Nakahata in order to increase tensile strength of Shimalla."

Shimalla discloses an apertured nonwoven fabric wherein each aperture is surrounded by a perimeter of fused thermoplastic material. Col. 2, lines 37-53. Shimalla discloses that a fibrous web is subjected to a combination of heat and pressure at an embossing nip to create fused regions in the web. Col. 3, lines 63 - Col. 4, line 10. Apertures are formed in the fused region by stretching the web either in the machine or cross direction. Col. 4, lines 16-47.

A. The Office has failed in its *prima facie* case of obviousness in regard to Claim 7 since the proposed modification renders the reference unsatisfactory for its intended purpose.

Case law states that if a proposed modification would render the prior art invention unsatisfactory for its intended purpose, there is no suggestion or motivation to make the proposed modification. *See In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984). The Office asserts Nakahata and Shimalla together disclose Appellants' nonwoven web as provided in Claim 7. The Office states that "[i]t would have been obvious to one of ordinary skill in the art at the time of the invention to use the material and melt-stabilized holes of Shimalla as the materials and holes of Nakahata in order to increase tensile strength of Shimalla." However, Shimalla and Nakahata may not be combined because to do so would render Nakahata unsatisfactory for its intended purpose.

Assuming *arguendo*, the hypothetical combination of Shimalla and Nakahata may yield an apertured topsheet wherein the apertures are surrounded by a perimeter of fused thermoplastic material. The apertures of Shimalla are formed by stretching fused regions of a fibrous web. Nothing in Shimalla teaches or suggests that its apertures close. To the contrary, Figures 1 and 2 of Shimalla suggest that the apertures remain open. If the hypothetical combination has the apertures of Shimalla, the hypothetical combination must then also have fixed apertures that do not close. Fixed apertures destroy the benefit of the slits/openings of Nakahata. The slits (206) of Nakahata permit openings (212) to form when tensile forces are applied during wear and to close when the tensile forces are removed. *See* Col. 11, lines 30-64. The openings permit fecal matter to pass through the topsheet. Col. 11, line 45-49. Upon closure of the openings, the fecal matter is concealed from view. Col. 11, lines 58-64. If the openings are the fixed apertures of Shimalla, the article of Nakahata would no longer have slits that open upon the application of a force and close upon the removal of the force. As a result, Nakahata would no longer be able to accept and conceal fecal matter. The Office may not combine these references since the combination destroys the intended purpose of the topsheet of Nakahata.

B. The Office has failed in its *prima facie* case of obviousness by not teaching or suggesting the Claim 7 limitation of "said nonwoven web . . . being capable of at least 70%

extension in the cross machine direction at a loading of 10 g/cm". The Office states, "Nakahata further discloses that the topsheet has an elastic extensibility of from about 10% to about 500% in the cross machine direction, which reads on Appellants' limitation being capable of at least 70% extension in the cross machine direction at a loading or (sic) 10 g/cm."

Nakahata discloses that its topsheet has an elastic extensibility of from about 10% to about 500. Shimalla discloses that the fabric can be stretched up to 50% in the cross-direction by passing the fabric over a bow roll; however, Shimalla provides no teaching as to extensibility of the resultant apertured web. Neither Shimalla nor Nakahata teach or suggest a nonwoven web capable of at least 70% extension *at a loading of 10 g/cm*. Throughout prosecution, the limitation of "at a loading of 10 g/cm" has continued to be read out of Claim 7 by the Office.

The Office, in Paper 05242004, states that "since Nakahata discloses that the topsheet has an elastic extensibility of from about 10% to about 500% in the cross machine direction by a tensile force . . . , it is deemed to have the 'ability to' have at least 70% extension in the cross machine direction at a loading or (sic) 10 g/cm." Again, the relevant teaching or suggestion that is missing from Nakahata is the load required to produce the recited extensibility. The Office provides no reasoning as to why the topsheet of Nakahata is "deemed" to have 70% extension in the cross machine direction at a loading of 10 g/cm. The Office fails to point to a teaching or suggestion in Nakahata, Shimalla, or in any other document that recites the claimed extension at the claimed loading. The Office has failed in its *prima facie* case of obviousness to teach or suggest each and every claim limitation.

Additional arguments presented above in section I.B. with regard to Claim 1 are likewise applicable to the present Claim 7 rejection

C. The Office has failed in its prima facie case of obviousness by not teaching or suggesting the Claim 8 limitation of "said nonwoven web comprises an open area greater than 15%." In view of Nakahata's Fig. 4, the Office states that Nakahata "appears to teach" Appellant's claim limitation of a nonwoven web having an open area greater than 15%. Nakahata provides no disclosure of open area within the specification. The Office does not rely on Shimalla to teach or suggest the present claim limitation. Case law states, "[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue." *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956, 55 U.S.P.Q.2D 1487 (Fed. Cir. 2000). The Office is relying on the drawings of Nakahata to show the proportions and sizes of elements (i.e., open area of greater than 15%) while the specification of Nakahata is silent as to the open area. In light of the holding of the Federal Circuit, the Office may not read a precise proportion

from the drawings. Thus, Nakahata fails to teach the limitation of an open area greater than 15%. The additional comments presented above in Section I.A. with regard to Claim 1 limitation relating to "open area greater than 15%" are likewise applicable with regard to the present Claim 8 rejection.

III. Claims 1-4 and 6 are not properly rejected under 35 U.S.C. § 103 as being unpatentable over Nakahata in view of Shimalla in further view of Curro.

The Office's reasoning for this rejection is provided in Paper 13, Paragraph 9. In support of this rejection, the Office states that "it would have been obvious to one of ordinary skill in the art at the time of the invention to use an aspect ratio of less than 6 in the combination of Nakahata and Shimalla as taught by Curro in order to provide the benefit of retaining more open area when the web is extended."

Assuming *arguendo*, the hypothetical combination of Nakahata, Curro, and Shimalla may yield a the topsheet of Nakahata having the apertures surrounded by a perimeter of fused thermoplastic material of Shimalla with the aspect ratio of Curro. However, in order to reach the hypothetical combination asserted by the Office, one must disregard well-settled case law pertaining to the suggestion or motivation to combine references. Furthermore, the hypothetical combination fails to each all of Appellants' claim limitations.

As previously presented above, the Office has failed to establish a *prima facie* case of obviousness for the combinations of (i) Nakahata and Curro and (ii) Nakahata and Shimalla. With regard to the combination of Nakahata and Curro, the following errors in establishing a *prima facie* case of obviousness have been noted: (1) Nakahata and Curro fail to teach as least two limitations recited in Claim 1, (2) the proposed combination would render Nakahata or Curro unsatisfactory for its intended purpose, and (3) the Office improperly "picks and chooses" among individual elements of the prior art references to recreate the claimed invention based on the hindsight. With regard to the combination of Nakahata and Shimalla, the following errors in establishing a *prima facie* case of obviousness have been noted: (1) the proposed combination would render Nakahata unsatisfactory for its intended purpose and (2) Nakahata and Shimalla fail to teach each and every limitation of Claims 7 and 8. With regard to the combination of all three references, all of the listed failures are applicable.

A. The Office has failed in its *prima facie* case of obviousness by not teaching or suggesting the Claim 1 limitation of "said nonwoven web . . . being capable of at least 70% extension in the cross machine direction at a loading of 10 g/cm". As presented above, the combinations of Nakahata/Curro, and Nakahata/Shimalla fail to teach or suggest the limitation of

a web capable of at least 70% extension in the cross machine direction at a loading of 10 g/cm. With both combinations, the Office relies upon Nakahata as being "deemed to have the 'ability to' have at least 70% extension in the cross machine direction at a loading or (sic) 10 g/cm." Discussion of Nakahata's failure to teach or suggest the present limitation has been presented above in Sections I.B. and II.B. The combination of Nakahata, Curro, and Shimalla does not address the deficiencies of Nakahata. The Office fails to point to a teaching or suggestion in Nakahata, Curro, or Shimalla that recites the claimed extension at the claimed loading. The Office has failed in its *prima facie* case of obviousness by not teaching or suggesting each and every claim limitation.

B. The Office has failed in its prima facie case of obviousness by not teaching or suggesting the Claim 1 limitation of "said nonwoven web having an open area greater than 15%." As discussed above, the combination of Nakahata/Curro or Nakahata/Shimalla fails to teach or suggest the limitation of a nonwoven web having an open area greater than 15%. The Office relies on Nakahata alone to teach or suggest the present claim limitation. As discussed above in Sections I.A. and II.C., Nakahata's Figure 4 may not be relied upon to show proportions of the elements. Since Nakahata has been shown not to teach or suggest the limitation of "an open area greater than 15%," the Office has failed in its *prima facie* case of obviousness by not teaching or suggesting each and every claim limitation.

C. The Office has failed in its prima facie case of obviousness by engaging in impermissible hindsight reconstruction in regard to Claim 1. As discussed above in Section I.C. with reference to the combination of Nakahata and Curro, Appellants submit that the Office has merely selected "aspect ratio" from Curro for insertion into Nakahata without appreciating the distinctions between the two references. The Office does not state how the addition of Shimalla addresses the Curro teaching of aspect ratios. As a result, Appellant's argument as presented above is applicable to this rejection. The Office's hypothetical combination is a product of such prohibited "picking and choosing".

D. The Office has failed in its prima facie case of obviousness in regard to Claim 1 since the proposed modification renders the reference unsatisfactory for its intended purpose. The Office is relying on the previously described combination of Nakahata and Shimalla along with the teaching of aspect ratio from Curro. As discussed above in Section II.A. with reference to the combination Nakahata/Shimalla, the Office states that it would have been obvious to one of ordinary skill in the art at the time of the invention to use the material and melt-stabilized holes of Shimalla as the material and holes of Nakahata. As discussed above, such a combination renders Nakahata unsatisfactory for its intended purpose of having opening that can open and close with

the application and removal of a force. Shimalla, conversely, relates to apertures; nothing in Shimalla teaches or suggests that its apertures close.

IV. Claim 5 is not properly rejected under 35 USC § 103(a) as being unpatentable over Nakahata in view of Curro in further view Benson.

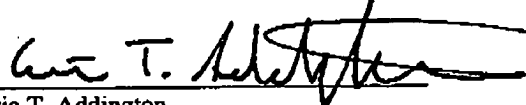
The Office's reasoning for this rejection is provided in Paper 13, Paragraph 10. In support of this rejection, the Office concedes that Nakahata and Curro fail to disclose the meltblown fibers include meltblown microfibers. The Office states that Benson teaches a nonwoven web comprising meltblown microfibers. The Office concludes that "[i]t would have been obvious to one of ordinary skill in the art at the time of the invention to use meltblown microfibers as the meltblown fibers in Nakahata as taught by Benson." Appellant submits that Claim 5, ultimately dependent upon Claim 1, stands or falls with the arguments presented in Section I.

SUMMARY

It is respectfully submitted that Claims 1-10 have not been properly rejected under 35 U.S.C. § 103. In light of all of the analysis and discussion provided above, Appellants respectfully request the Board of Patent Appeals and Interferences to reverse the rejections of Claims 1 - 10 and to remand the application with instructions that these claims be allowed over the cited documents.

Respectfully submitted,

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Date: October 27, 2004

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(8642.AppealBrief NEW 2.doc)

CLAIMS APPENDIX

1. (Original) A nonwoven web comprising a plurality of apertures each having a hole size greater than 2 mm^2 , and a hole aspect ratio less than 6, said nonwoven web having an open area greater than 15% and being capable of at least 70% extension in the cross machine direction at a loading of 10 g/cm.
2. (Original) The nonwoven web of Claim 1, wherein said nonwoven web has a basis weight between 15 and 70 gsm.
3. (Original) The nonwoven web of Claim 1, wherein said nonwoven web has a basis weight between 40 and 50 gsm.
4. (Original) The nonwoven web of Claim 1 wherein said nonwoven web is a web selected from the group consisting of a bonded carded web of fibers, a web of spunbonded fibers, a web of meltblown fibers, and a multilayer material including at least one of said webs.
5. (Original) The nonwoven web of Claim 4 wherein said web of meltblown fibers includes meltblown microfibers.
6. (Original) The nonwoven web of Claim 1, wherein said nonwoven web is a topsheet on a disposable absorbent article.
7. (Original) A nonwoven web comprising a plurality of apertures formed by application of a tensioning force, said apertures coincident with a plurality of weakened, melt-stabilized locations, said apertures having a circumferential edge, a portion of said circumferential edge being defined by a remnant of said melt-stabilized locations, said nonwoven web capable of extension in the cross machine direction of at least 70% at a loading of 10 g/cm.
8. (Original) The nonwoven web of Claim 7, wherein said nonwoven web comprises an open area greater than 15% and an average aperture size greater than 2.0 mm^2 .
9. (Original) The nonwoven web of Claim 7, wherein said nonwoven web has a basis weight between 15 and 60 gsm.

10. (Original) The nonwoven web of Claim 7, wherein said nonwoven web is a topsheet on a disposable absorbent article.
11. (Withdrawn) A method for making a highly extensible apertured nonwoven web comprising the steps of:
 - a) providing a nonwoven web having a length measured in a machine direction and a first width measured in a cross machine direction;
 - b) weakening said nonwoven web at a plurality of locations to create a plurality of weakened, melt-stabilized locations;
 - c) applying a first tensioning force to said nonwoven web to cause said nonwoven web to rupture at said plurality of weakened, melt-stabilized locations creating a plurality of apertures in said nonwoven web coincident with said plurality of weakened, melt-stabilized locations, said first tensioning force causing said nonwoven web to have a second width;
 - d) incrementally stretching said nonwoven web to locally extend portions of said nonwoven web in a direction substantially parallel to said cross machine direction to a third width that is greater than the second width;
 - e) applying tension to said nonwoven web in the machine direction such that said nonwoven web has a width less than said third width.
12. (Withdrawn) The method of Claim 11 wherein said nonwoven web is a web having a peak CD extensibility of at least 150%, and being selected from the group consisting of a bonded carded web of fibers, a web of spunbonded fibers, a web of meltblown fibers, and a multilayer material including at least one of said webs.
13. (Withdrawn) The method of Claim 12 wherein said meltblown web includes meltblown microfibers.
14. (Withdrawn) The method of Claim 11 wherein said nonwoven web comprises an elastic nonwoven web.
15. (Withdrawn) The method of Claim 11 wherein said nonwoven web comprises a nonelastic nonwoven web.

16. (Withdrawn) The method of Claim 11 wherein said second tensioning step causes said nonwoven web to exhibit extension in the cross machine direction of at least 70% at 10g/cm loading.
17. (Withdrawn) A method for making a highly extensible apertured nonwoven web comprising the steps of:
 - a) providing an apertured nonwoven web having a length measured in a machine direction and a first width measured in a cross machine direction;
 - b) incrementally stretching said nonwoven web to locally extend portions of said nonwoven web in a direction substantially parallel to said cross machine direction to a second width that is greater than the first width;
 - c) applying tension to said nonwoven web in the machine direction such that said nonwoven web has a width less than said second width.
18. (Withdrawn) The method of Claim 17 wherein said nonwoven web is a web having a peak CD extensibility of at least 150%, and being selected from the group consisting of a bonded carded web of fibers, a web of spunbonded fibers, a web of meltblown fibers, and a multilayer material including at least one of said webs.
19. (Withdrawn) The method of Claim 17 wherein said nonwoven web is a composite material comprising a mixture of fibers and one or more other materials selected from the group consisting of wood pulp, staple fibers, particulates and superabsorbent materials.
20. (Withdrawn) The method of Claim 17 wherein said tensioning step causes said nonwoven web to exhibit extension in the cross machine direction of at least 70% at 10g/cm loading.